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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SUSAN D. LINTZ, Cross-complainant and Appellant, v. WILLIAM F. DOHR et al., Cross-defendants and Appellants.	G054929 (Super. Ct. No. 30-2011-00502087) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, William D. Claster, Judge. Affirmed in part and reversed in part.

Thomas Vogele & Associates, Thomas A. Vogele and Timothy M. Kowal for Cross-defendants and Appellants.

Lytton & Williams, Richard D. Williams and Mina Hakakian for Cross-complainant and Appellant.

* * *

INTRODUCTION

Susan Lintz asserted causes of action against Amberhill Development, Ltd. (Amberhill), William F. Dohr, and Mark W. Child for breach of fiduciary duty, fraudulent misrepresentation, fraudulent concealment and, against Amberhill only, a common count for money lent. Following a bench trial, the trial court awarded Susan Lintz $280,000 in damages against Amberhill, Dohr, and Child under the cause of action for breach of fiduciary duty. The trial court found against Susan Lintz on her other claims and theories of recovery and awarded judgment on them to Amberhill, Dohr, and Child.

Amberhill, Dohr, and Child appealed from the judgment in favor of Susan Lintz.[1] She appealed from the judgment in favor of Amberhill, Dohr, and Child.

We reverse the judgment in favor of Susan Lintz and otherwise affirm. A summary of our conclusions is as follows:

Amberhill, Dohr, and Child Appeal. The trial court found that Amberhill, Dohr, and Child breached their fiduciary duties to Susan Lintz by causing an entity called Atavus Investments, LLC (Atavus) to make a $4 million preferential return payment to Sterling Homes Corporation (Sterling) without first paying off a $280,000 loan that Susan Lintz had made to Atavus. Amberhill was the manager of Atavus and therefore owed fiduciary duties both to Atavus and its members, which included Susan Lintz. However, Susan Lintz recovered $280,000 from Amberhill, Dohr, and Child only because she was a creditor of Atavus. Neither Atavus nor Amberhill owed fiduciary duties to creditors, which is the role in which Susan Lintz obtained her recovery. She therefore cannot recover $280,000 for breach of fiduciary duty. In reaching this conclusion we follow *Speirs v. BlueFire Ethanol Fuels, Inc.* (2015) 243 Cal.App.4th 969 (*Speirs*).

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[1] To avoid confusion, we refer to Susan Lintz and other members of the Lintz family by first and last name.

Susan Lintz Appeal. Sterling received a $4 million preferential return from Atavus. Susan Lintz is a minority shareholder of Sterling. She asserted Dohr and Child breached their fiduciary duties as the controlling shareholder/directors of Sterling by distributing the $4 million to Amberhill, to themselves, or to entities they controlled, instead of distributing the $4 million as dividends to Sterling's shareholders. We conclude the trial court erred by judging Dohr and Child's decisions under the deferential business judgment rule instead of *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108 (*Jones*), which holds that majority shareholders owe fiduciary duties to minority shareholders. The error was harmless, however, because (1) substantial evidence supported an implied finding that Dohr and Child did not breach their fiduciary duties by failing to distribute the $4 million as dividends to Sterling's shareholders and (2) there is no reasonable probability the trial court would have reached a decision more favorable to Susan Lintz if it had applied *Jones* instead of the business judgment rule. Finally, Susan Lintz's fraudulent misrepresentation and fraudulent concealment causes of action have no merit under the law or the evidence presented at trial.

FACTS

I.

Sterling, Atavus, and Amberhill

Robert Lintz was a successful businessman and real estate developer in Orange County. Sterling was one of his key holdings. Susan Lintz, who is Robert Lintz's daughter, married Dohr in 1985. Although Susan Lintz and Dohr divorced in 1991, he remained close to Robert Lintz and continued working for him. Sometime in the 1990's, Dohr acquired an interest in Sterling from Robert Lintz. By 2003, Dohr had a 68 percent ownership position in Sterling. Susan Lintz and her brother Jim Lintz each hold a 15.67 percent interest in Sterling based on a transfer from Robert Lintz and a 2003 stock redemption.

Both Dohr and Susan Lintz are directors of Sterling. Mark Child was a Sterling director from 2000 to 2014.

Atavus was created in 2004 "to conduct all the activities currently conducted by Sterling." Many of Sterling's real estate projects were transferred to Atavus. The members and ownership positions of Atavus were Susan Lintz (11.25 percent), Jim Lintz (11.25 percent), Robert Lintz's daughter Mackenzie Lintz (22.5 percent), Robert Lintz's grandchild Peter Lintz (22.5 percent), Robert Lintz's grandchild Morgan Lintz (22.5 percent), and Sterling (10 percent).

Robert Williams, an accountant who was primarily responsible for structuring Atavus, stated in a memo to Dohr that Atavus was "intended to create liquidity for the minor members only when they achieve adult age" and "[t]he adult members [Susan Lintz and James Lintz] will have the ability to realize liquidity currently through preference distributions to Sterling Homes, of which they are shareholders."

Atavus is subject to an operating agreement (the Atavus Operating Agreement) several sections of which are important in this appeal. Section 3.2 provides that "Additional Capital Contributions" by Atavus members shall be entitled to accrue "Preferential Return" in an account identified as the "Preferred Return Account." Sterling contributed its minority-membership interests in several projects to Atavus and, in exchange, received a $7 million preferential capital account with a right to a preferential return at a compound annual rate of 10 percent. Other than its capital account in Atavus and the right to receive the preferential return, Sterling had virtually no assets or sources of income.

Section 4.1.1(ii) of the Atavus Operating Agreement provides that preferential return payments are entitled to priority over other payments to members. Section 4.1.3(a) states, however, that "[a]nything to the contrary in this Section 4.1 notwithstanding, no distributions shall be made (a) to any Member under this Section at any time the Company is delinquent on any of its obligations."

Amberhill is a development company that is owned by Dohr and operated by Dohr as president and Child as vice-president. Amberhill managed several real estate projects on behalf of various entities including, in 2003, Sterling. At all relevant times, Amberhill has been the manager of Atavus. Section 5.1.1 of the Atavus Operating Agreement gives Amberhill the right and power to manage Atavus, including the right to borrow money and pledge assets as security. Pursuant to section 5.1.5, Amberhill is entitled to receive a management fee equal to 1 percent of the Atavus asset base.

As of 2003, Amberhill also was the manager of Regent Ontario, LLC (Regent Ontario). Atavus contributed about 99 percent of Regent Ontario's capital and in exchange received a 40 percent ownership interest (the remaining 60 percent was owned by entities owned by either Dohr or Child). Under section 5.5 of Regent Ontario's operating agreement, the first priority on the distribution of available cash following payment of the entity's current costs and expenses, including interest expenses on member and third party loans, is the discharge of Regent Ontario's indebtedness and liabilities. The next priorities are repayment of member loans and the return of members' capital contributions.

II.

Susan Lintz's Loan to Amberhill

In 2003, Susan Lintz loaned $275,000 to Amberhill. The loan was memorialized by a promissory note made by Amberhill (the Amberhill Promissory Note). In October 2008, the Amberhill Promissory Note was transferred to Atavus, and Atavus made a promissory note in favor of Susan Lintz in the face amount of $320,000. At the bottom of the Amberhill Promissory Note is this handwritten notation: "Note repaid by execution of note from Atavus Investments dated 10/1/2008." Susan Lintz signed an acknowledgment of this notation. She alleged and has maintained, however, that the transfer of the Amberhill Promissory Note to Atavus was improper and ineffective and that Amberhill has always been liable to repay the loan.

In February 2010, another promissory note in face amount of $280,000 was made by Atavus payable to Susan Lintz. The maturity date was November 1, 2010.

III.

Payment by Atavus of $4 Million Preferential Return Payment to Sterling

Following months of negotiations, property owned by Regent Ontario was sold in December 2010. Atavus received $4 million in sale proceeds from Regent Ontario. At that time, Atavus owed Sterling about $6 million of accrued preferential return on Sterling's $7 million capital account. Under section 3.2 of the Atavus Operating Agreement, the $4 million received by Atavus from Regent Ontario was paid ("upstreamed") to Sterling as a payment of preferential return to reduce the amount of the accrued preferential return that was owed.

None of the Regent Ontario proceeds was used to repay the loan made by Susan Lintz. In October 2010, Susan Lintz's attorney sent a letter to Atavus's attorney, Thomas Vogele, advising that the promissory note was coming due on November 1, 2010 and inquiring whether Atavus intended to make a cash payoff or reach some other mutually agreeable arrangement. Vogele responded that Atavus did not have the funds to repay the loan and proposed a two-year extension of the note. Counsel did not resolve the payment impasse. The note was outstanding and in default on December 14, 2010 and was not paid when Atavus received the $4 million proceeds on the sale of the Regent Ontario properties.

IV.

Sterling's Distributions out of the $4 Million Preferential Return

Sterling did not distribute the $4 million preferential return payment to its shareholders but used the funds for other purposes. Dohr and Williams consulted and

jointly made that decision without a formal meeting of the Sterling board of directors, which included Susan Lintz.

The $4 million received by Sterling was distributed in the following ways: (1) about $2.4 million was distributed from Sterling to Amberhill through 165 individual funds transfers (characterized as loans) over the period from December 2010 to September 2015; (2) about $500,000 was distributed directly to Dohr and Child as loans, repayment of existing loans to Sterling, or payment of legal fees; and (3) $1 million was distributed on December 14, 2010 as a loan to a limited liability entity called Yellow Duck Investments (Yellow Duck), which was owned 90 percent by an entity controlled by Dohr and identified at trial as the "Dohr Grandchildren's Trust."

Yellow Duck used the $1 million to facilitate settlement with a lender that was threatening to foreclose on a loan made to a real estate company in which Atavus had a 12.5 percent interest and to sue Dohr and Child on their guarantees of the loan. At least $200,000 of the preferential return paid to Sterling was used to pay Dohr's personal legal fees. About $700,000 of the preferential return was used to repay Dohr and Child for loans they had made to fund Regent Ontario's operation and to pay Williams his fees.

PROCEDURAL HISTORY

This litigation began when Dohr filed a complaint against Susan Lintz for declaratory relief. In response to the complaint, Susan filed a cross-complaint against Dohr and others. At the same time, Susan filed a separate complaint against Amberhill, Dohr, Child, and various entities owned or controlled by Dohr or Child, Williams, and others, asserting the same claims made in the cross-complaint but as derivative claims on behalf of Sterling and Atavus. Susan consolidated the claims of her cross-complaint and those of her derivative action in the second amended cross-complaint. Susan Lintz did not assert any causes of action against Atavus for repayment of her loan. A series of

demurrers and other challenges to the pleadings led to five consolidated appeals that were the subject of a prior opinion.

The matter was tried to the court on Susan Lintz's sixth amended cross-complaint, which had two causes of action each for breach of fiduciary duty (first and second causes of action), fraud (third and fourth causes of action), fraudulent concealment (fifth and sixth causes of action), and a common count for money lent. The first, third, and fifth causes of action, and the common count, were brought by Susan Lintz in her individual capacity. The second, fourth, and sixth causes of action were derivative and brought on behalf of Atavus and/or Sterling. The first through sixth causes of action were directed against Dohr, Child, and Amberhill. The common count was directed against Amberhill. James Lintz was named as a nominal defendant.

Broadly speaking, Susan Lintz sought to recover damages under four theories: (1) Atavus paid Sterling $4 million from the Regent Ontario sale proceeds without first repaying her $280,000 loan; (2) Amberhill owed her $280,000 as money lent; (3) Sterling had a fiduciary duty to distribute to its shareholders the $4 million received from Atavus but instead distributed the money in ways that benefitted only Dohr, Child, and Amberhill; and (4) Dohr and Child engaged in deceit by misrepresenting the structuring of Sterling and Atavus in 2003 and concealing the sale of Regent Ontario property. Susan Lintz presented other claims at trial but does not challenge the trial court's rulings on them.

The trial court awarded Susan Lintz damages in the amount of $280,000 on the first cause of action. The court issued a statement of decision explaining its reasoning on each of the theories presented by Susan Lintz. The court found that Amberhill, Dohr, and Child breached their fiduciary duties by causing Atavus to make the preferential return of $4 million to Sterling without first paying off the $280,000 loan from Susan Lintz. That action, the court found, also violated section 4.1.3 of the Atavus Operating Agreement. Susan Lintz's damages were $280,000 plus interest "since this amount

should have been paid by Atavus to Susan before the upstreaming occurred." The court found there was no clear and convincing evidence of fraud, oppression, or malice and declined to award punitive damages. The trial court found against Susan Lintz on her cause of action against Amberhill for money lent because the evidence established she had consented to the transfer of the note from Amberhill to Atavus.

The trial court found against Susan Lintz on her claim that Dohr, Child, and Sterling breached their fiduciary duties in the manner in which Sterling distributed the $4 million preferential payment from Atavus. The court initially made some unfavorable comments about Dohr, Child, and the entities they controlled: "[Susan Lintz's] distrust of Dohr and Child (as well as her distrust of their lawyers and accountant) is easy to understand. For better or worse, Dohr, Child and their advisors have created a jumble of entities that are difficult to untangle. The LLC agreements pertaining to these entities are complicated, and the accounting records and business transactions are equally obtuse. Various payments and transactions are explained as 'being for tax reasons' even when the payments are arguably being mischaracterized (e.g., nearly $200,000 in 'distributions' to accountant Williams)."

The trial court found that nearly every transaction at issue was "troubling" and involved "potential conflicts of interest given Dohr's ownership and management of Amberhill and Amberhill's management of the various entities either borrowing money, lending money or being entitled to return on investments." The court explained: "For example, Dohr's approval (in his capacity as owner of Amberhill) of his own loan to Regent Ontario (which Amberhill managed) clearly raises a question whether this loan (as opposed to this cash infusion being treated as an 'investment')·was in the best interests of Atavus, one of the three owners of Regent Ontario. Dohr and Amberhill claim that it was in the best interests [of Atavus] while Susan disputes this. Similar scenarios occur with respect to various other transactions."

The trial court concluded, however, "these apparent conflicts of interest are not enough by themselves to establish breaches of fiduciary duty." Because the Court of Appeal had affirmed the dismissal of Susan Lintz's alter ego claims, the trial court accepted the fact the entities were legally separate. The trial court found against Susan Lintz because there was no evidence of a Sterling corporate document requiring distribution of the $4 million preferential return payment to Sterling shareholders and because each of challenged transfers made by Sterling had a valid business purpose. We shall examine in detail the trial court's findings in part III of the Discussion section when we address the propriety of each of the transfers and distributions from Sterling out of the $4 million preferential return payment.

Judgment in the amount of $280,000 plus interest was entered in favor of Susan Lintz and against Amberhill, Dohr, and Child on Susan Lintz's breach of fiduciary duty cause of action. Amberhill, Dohr, and Child filed a notice of appeal from the judgment, as did Susan Lintz.

DISCUSSION:

AMBERHILL, DOHR, AND CHILD'S APPEAL

In their appeal, Amberhill, Dohr, and Child challenge the judgment awarding Susan Lintz $280,000 in damages under a breach of fiduciary duty cause of action. Amberhill, Dohr, and Child present several arguments, one of which we find to be dispositive. Relying on *Speirs, supra*, 243 Cal.App.4th 969, Amberhill, Dohr, and Child argue that although Susan Lintz was owed a fiduciary duty as a member of Atavus, she recovered $280,000 in her capacity as a creditor. Because Amberhill owed no fiduciary duties to Atavus's creditors, Amberhill (and therefore Dohr and Child too) cannot be liable to Susan Lintz for $280,000 under a theory of breach of fiduciary duty.

Amberhill was the manager of Atavus and therefore during the period of time at issue owed to Atavus and its members the same fiduciary duties that a partner

owes to a partnership and its partners. (Corp. Code, former § 17153.) "The manager owes the same fiduciary duties to the limited liability company and to its members as a partner owes to a partnership and to the partners of the partnership." (*People v. Pacific Landmark* (2005) 129 Cal.App.4th 1203, 1212.) Susan Lintz was a member of Atavus. Amberhill therefore owed directly to Susan Lintz, in her capacity as a member of Atavus, the same fiduciary duties that Amberhill owed to Atavus.

But, as Amberhill, Dohr, and Child assert, a contract or debt does not create a fiduciary relationship. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 206 ["No fiduciary duty exists between a borrower and lender in an arm's length transaction"]; *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 732 ["A mere contract or a debt does not constitute a trust or create a fiduciary relationship"]; *Downey v. Humphreys* (1951) 102 Cal.App.2d 323, 332 ["A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such"].) Neither Atavus nor any of its members therefore owed a fiduciary duty to Susan Lintz arising out of her loan. With respect to her loan, Susan Lintz's relationship with Atavus was that of creditor. As a consequence, Amberhill, as Atavus's manager, owed no fiduciary duties arising out of the loan.

According to *Speirs, supra*, 243 Cal.App.4th 969, whether Susan Lintz suffered harm in her capacity as a member of Atavus or as its creditor is dispositive of her right to recover. The plaintiffs in *Speirs* were minority shareholders in the defendant corporation. (*Id.* at p. 973.) The plaintiffs also held warrants (options to buy common stock at a particular price on a particular day) issued by the defendant corporation. (*Id.* at p. 971.) The plaintiffs alleged that defendant Klann (a majority shareholder and officer in the defendant corporation) and defendant Scott (an officer in the defendant corporation), owed the plaintiffs fiduciary duties of loyalty based on their status as minority shareholders. (*Id.* at p. 980.) The plaintiffs alleged that Klann and Scott breached their fiduciary duties by refusing to apply antidilution protections provided in the plaintiffs'

warrants. (*Id.* at pp. 980-981.) The plaintiffs did not assert the harm caused by the breach of fiduciary duty was dilution of or drop in the value of their shares of common stock. (*Id.* at p. 981.)

The Court of Appeal affirmed a nonsuit on the plaintiffs' breach of fiduciary duty cause of action. (*Speirs, supra*, 243 Cal.App.4th at pp. 972, 979.) The court concluded the plaintiffs' breach of fiduciary duty cause of action lacked merit as a matter of law because "Klann and Scott did not owe a fiduciary duty to warrant holders, which is the role in which plaintiffs were allegedly harmed by defendants' actions." (*Id.* at p. 982.) As minority shareholders, the plaintiffs were owed fiduciary duties, but the plaintiffs did not seek recovery for damage to their interests as shareholders. Neither a corporation nor its insiders owe a fiduciary duty to warrant holders, the role in which the plaintiffs sought recovery. The *Speirs* court explained: "These distinct legal relationships—(1) the fiduciary relationship of corporate insiders to minority shareholders and (2) the contractual relationship of corporations and warrant holders—should not be conflated, even if the same individuals are both minority shareholders and warrant holders." (*Id.* at p. 983.)

The case at hand concerns a debt instead of warrants, and the wrongful conduct was undertaken by third parties rather than by corporate insiders, but those are distinctions without a difference. The dispositive point is Susan Lintz recovered $280,000 for breach of fiduciary duty in her role as a creditor of Atavus. She could have suffered that harm only in her role as a creditor because $280,000 was the face amount of the delinquent promissory note and was unrelated to her shareholder status. She did not recover for diminution in value of her Atavus shares or for anything else in her role as a minority shareholder. Although Amberhill, as Atavus's manager, owed Susan Lintz fiduciary duties as a minority shareholder, neither Amberhill nor Atavus owed her fiduciary duties as a creditor and therefore neither could be liable to her in that role.

Susan Lintz attempts to distinguish *Speirs* by arguing that Amberhill, Dohr, and Child not only caused the $4 million preferential return to be paid to Sterling without repaying her loan, but distributed the $4 million out of Sterling to benefit themselves. Susan Lintz is lumping together two different sets of fiduciary duties and alleged wrongdoing. Susan Lintz recovered $280,000 under the theory that Amberhill, as the manager of Atavus, owed fiduciary duties to her as an Atavus member and breached those duties by upstreaming the $4 million to Sterling without first repaying her loan. Susan Lintz's right to recover, if any, based on the distributions out of Sterling, in contrast, must be based on fiduciary duties owed to her as a minority shareholder of *Sterling*, not as an Atavus member.

We follow the reasoning of *Speirs* and reverse the judgment in favor of Susan Lintz because "[Amberhill, Dohr, and Child] did not owe a fiduciary duty to [creditors], which is the role in which [Susan Lintz] w[as] allegedly harmed by defendants' actions." (*Speirs, supra*, 243 Cal.App.4th at p. 982.) Susan Lintz was not without a remedy for repayment of her loan. She could have sued Atavus directly on the note and possibly had a claim against Amberhill, Dohr, and Child for interference with contractual relations. She made the decision to try to recover the amount due on the note by suing Amberhill, Dohr, and Child under a cause of action for breach of fiduciary that cannot provide her relief.

DISCUSSION:

SUSAN LINTZ'S APPEAL

In her appeal, Susan Lintz challenges the trial court's findings that Dohr and Child did not breach their fiduciaries duties in the way in which they distributed the $4 million preferential return that Sterling received from Atavus. She argues (1) the trial court erred by applying the deferential business judgment rule instead of the stricter standard of fiduciary obligations set forth in *Jones, supra*, 1 Cal.3d at page 108; (2) Dohr

and Child breached their fiduciary duties under *Jones* by failing to distribute the $4 million preferential return payment as dividends to Sterling's shareholders; (3) Dohr and Child breached their fiduciary duties under *Jones* by distributing the $4 million preferential return payment to Amberhill, Dohr, Dohr-related or Child-related entities, and Yellow Duck; and (4) Dohr and Child engaged in fraudulent misrepresentations and fraudulent concealment.

I.

The Trial Court Erred by Applying the Business Judgment Rule Instead of the *Jones* Standard.

In the statement of decision, the trial court found the various distributions made from Sterling out of the $4 million preferential return were justified by "reasonable business explanations," were made "in the best interests of Sterling," were "defensible business decision[s]," or were "appropriate." Susan Lintz argues those comments show the trial court erred by applying the deferential business judgment rule instead of the more rigorous rule governing the duties of majority shareholders toward minority shareholders. We agree.

The business judgment rule has two parts. One part immunizes directors from personal liability if they act in accordance with certain conditions. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045 (*Berg*).) Under this part of the business judgment rule, which is codified at Corporations Code section 309, a director must perform his or her duties "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (Corp. Code, § 309, subd. (a).) A director is insulated from liability if he or she performs those obligations in the manner provided in the statute. (*Id.*, § 309, subd. (c); *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 788.)

Under the business judgment rule, a director's liability must be based on no less than gross negligence. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 (*Katz*).)

The second part of the business judgment rule shields from court intervention those management decisions made by corporate directors in good faith and in what the directors believe is the corporation's best interest. (*Berg, supra,* 178 Cal.App.4th at p. 1045.) A court will not substitute its judgment for that of the board of directors if the board's decision "'can be "attributed to any rational business purpose."'" (*Katz, supra*, 22 Cal.App.4th at p. 1366.) This part of the business judgment rule "is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes." (*Berg, supra*, 178 Cal.App.4th at p. 1045.)[2]

Apart from the business judgment rule, majority shareholders and directors owe fiduciary duties to minority shareholders in the exercise of corporate powers. (*Jones, supra,* 1 Cal.3d at p. 108.) "[M]ajority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the

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[2] The business judgment rules establishes a rebuttable presumption that the directors' decisions are based on sound business judgment. (*Berg, supra*, 178 Cal.App.4th at pp. 1045-1046.) Exceptions to this presumption arise when the party challenging the directors' decision proves the action was taken (1) as a result of a conflict of interest, (2) without reasonable inquiry, or (3) with improper motives. (*Id*. at p. 1045.) "'[T]he presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts.'" (*Id*. at p. 1046.)

corporation's business." (*Ibid.*) "The rule applies alike to officers, directors, and controlling shareholders in the exercise of powers that are theirs by virtue of their position and to transactions wherein controlling shareholders seek to gain an advantage in the sale or transfer or use of their controlling block of shares." (*Id.* at p. 110.)

The statement of decision demonstrates the trial court assessed the propriety of the Sterling distributions by applying the second part of the business judgment rule, by which courts defer to board decisions justified by any rational business purpose. (*Katz, supra*, 22 Cal.App.4th at p. 1366.) The second part of business judgment rule is inapplicable to this case because Susan Lintz sought personal liability against Dohr and Child rather than court intervention in Sterling's corporate decisions. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258.)

A director is immune under the first part of the business judgment rule if the director acts "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders." A director or majority shareholder does not act in accordance with those precepts, and is not immune from liability, if the director or majority shareholder uses corporate power or control in bad faith or in a manner that is unfair or detrimental to minority shareholders, does not benefit all shareholders proportionately, or conflicts with the proper conduct of the corporation's business.

Susan alleged that Dohr, as the majority shareholder and a director of Sterling, and Child, as a director of Sterling, breached their fiduciary duties owed to her as a minority shareholder. Thus, the trial court should have applied *Jones* in judging the propriety of the distributions out of Sterling from the preferential return payment. Under *Jones*, the question is not whether the decisions made by Dohr and Child had any rational business purpose. Instead, the questions are whether Dohr and Child controlled Sterling in a "fair, just, and equitable manner" and whether their decisions about distributing the $4 million preferential return were made to "benefit themselves alone or in a manner

detrimental to the minority" or to "benefit all shareholders proportionately." (*Jones, supra,* 1 Cal.3d at p. 108.)

The trial court legally erred by using the business judgment rule instead of the *Jones* standard. Amberhill, Dohr, and Child argue Susan Lintz forfeited her entire appeal by not bringing to the trial court's attention legal error in the statement of decision. That argument is without merit. A party claiming omissions or ambiguities in the trial court's *factual* findings must bring the ambiguities or omissions to the trial court's attention or else face the doctrine of implied findings. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59 (*Fladeboe*).) "In contrast, a party does not waive objections to *legal errors* appearing on the face of the statement of decision by failing to respond to it." (*Ibid.*, italics added.)

Susan Lintz argues that all of the trial court's factual findings are "grounded" on the wrong legal standard and, therefore, the court's legal error of necessity requires reversal of the judgment. Reversal is not automatic; instead, we determine whether the legal error was prejudicial. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.) An error is prejudicial if it is reasonably probable that in absence of the error a result more favorable to the appealing party would have been reached. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-574.) In other words, if the trial court had used the *Jones* rule instead of the business judgment rule, is it reasonably probable the court would have concluded Amberhill, Dohr, and Child breached their fiduciary duties to Susan Lintz by distributing as they did the $4 million preferential return paid to Sterling?

II.

Dohr and Child Did Not Breach Their Fiduciary Duties by Failing to Distribute the $4 Million Preferential Return Payment as Dividends to Sterling Shareholders.

Susan Lintz had a 15.67 percent ownership interest in Sterling, which, she contends, gave her a right to about $627,000 of the $4 million preferential return paid to Sterling. She argues Dohr and Child breached their fiduciary duties under *Jones* by failing to pay her $627,000 share. She argues that "wrongful suppression of corporate distributions is a common ground on which courts find that majority shareholders have breached their fiduciary duties in closely held corporations" and "[t]he same result follows in the present case, where the preferred return account was expressly set up as the vehicle for proportionate distribution."

The decision to declare and pay dividends is usually at the discretion of a corporation's board of directors. (*Zellerbach v. Allenberg* (1893) 99 Cal. 57, 70-71.) However, failure by controlling shareholders to pay dividends while paying themselves excessive executive compensation might constitute a breach of fiduciary duty under *Jones.* (See *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1258-1260 [majority shareholders' payment to themselves of excessive salaries reduced the amount of corporate profits available as dividends for minority shareholder]; *Wilkes v. Springside Nursing Home, Inc.* (Mass. 1976) 353 N.E.2d 657, 664 [denying minority shareholder corporate employment as part of freeze out scheme].)

The trial court found there was no evidence of a corporate document requiring that preferential returns received from Amberhill be paid to Sterling shareholders as dividends. The trial court also found: "While there was evidence that accountant Williams stated to Susan that the intention in creating Atavus (and the transfer of Sterling's assets to this entity) was to provide income to Sterling shareholders, that intent (as well as the two distributions in 2005) is not enough to establish a requirement

for a payout in 2010-2011." Susan Lintz does not challenge those findings on the ground of lack of substantial evidence to support them.

The trial court's findings foreclose the argument that Sterling had a contractual or corporate obligation to distribute the $4 million preferential return to its shareholders. As the trial court found, evidence that on prior occasions a preferential return was distributed to Sterling shareholders did not create an obligation to do so in the future.

The trial court did not make an express finding on the different and separate issue of whether failure to distribute the $4 million preferential return payment proportionately to Sterling shareholders constituted a breach of fiduciary duty under *Jones*. Susan Lintz did not, however, file objections to the statement of decision or bring any ambiguities or omissions in it to the trial court's attention. We therefore infer the trial court made an implied finding that failure to distribute the $4 million preferential return payment pro rata to the Sterling shareholders did not constitute a breach of fiduciary duty under *Jones*. (*Fladeboe, supra,* 150 Cal.App.4th at pp. 59-60.) We consider whether this implied finding is supported by substantial evidence (*id.* at p. 60) and conclude it is.

There is no evidence Amberhill, Dohr, and Child tried to shut out Susan Lintz or treat her unfairly by not paying out the $4 million preferential return payment as dividends. The decision not to pay dividends was driven by necessity. There was testimony at trial that distributions to Sterling shareholders were not even considered due to "economic implosion" and lack of cash.

The decision not to pay out the $4 million preferential return payment as dividends did not benefit Dohr and Child to the detriment of Susan Lintz, but had the same proportionate effect on all shareholders: Nobody got dividends. As a 68 percent shareholder of Sterling, Dohr would have received $2.63 million in dividends. He received nothing. Dohr and Child did not pay themselves excessive salaries in order to

reduce profits that could be paid to Susan Lintz. Sterling had no employees. Amberhill did have employees, and Susan Lintz received a monthly salary from Amberhill of $3,805. With benefits, she received about $60,000 a year. She did no work in exchange. In 2010 she asked to be taken off the Amberhill payroll.

In her reply brief, Susan Lintz argues *Jones* and *Stephenson v. Drever* (1997) 16 Cal.4th 1167 (*Stephenson*) are "squarely on point" (capitalization and boldface omitted). *Jones* and *Stephenson* certainly are relevant in defining the scope of the fiduciary duties owed by Dohr and Child as the controlling shareholder/directors of Sterling. Factually, however, those cases present quite different circumstances.

In *Jones*, the majority shareholders in a corporation formed a holding company, exchanged their high valued shares for a large number of lower value shares of the holding company, and offered the lower-valued shares for public sale. (*Jones, supra*, 1 Cal.3d at pp. 113-114.) The majority shareholders excluded the minority shareholders from this market. By doing so, the majority shareholders artificially created a market for their small number of high value shares and effectively made the minority shareholders' stock unmarketable. (*Id*. at pp. 113-114.) The California Supreme Court held that on those facts the minority shareholders could state a cause of action for breach of fiduciary duty. (*Id.* at pp. 101, 115.) The court stated: "[W]hen, as here, no market exists, the controlling shareholders may not use their power to control the corporation for the purpose of promotion a marketing scheme that benefits themselves alone to the detriment of the minority." (*Id.* at p. 115.)

Stephenson concerned a buy-sell agreement that gave a closely-held corporation the right and obligation to repurchase the shares of a minority shareholder/employee on termination of his employment. (*Stephenson, supra*, 16 Cal.4th at p. 1170.) The buy-sell agreement was silent as to the shareholder's rights after termination of employment for purposes of valuing the stock. (*Ibid*.) The California Supreme Court held the buy-sell agreement did not imply on its face an intention to deny

the minority shareholder's rights. (*Ibid.*) The court concluded such an implied term would allow the majority shareholders to disregard their fiduciary duties under *Jones* during the period in which the parties were attempting to determine the fair market value of the minority shareholder's stock. (*Id.* at p. 1179.)

Factually speaking, this case is unlike *Jones* or *Stephenson*. Susan Lintz did not allege Dohr and Child created and excluded her from an artificially-created market for their Sterling stock. Nor did she allege anything like the buy-sell agreement in *Stephenson.* Her claim is Dohr and Child breached their fiduciary duties by failing to pay out as dividends the $4 million preferential return paid to Sterling.

III.

It Is Not Reasonably Probable the Trial Court, If It Had Applied *Jones*, Would Have Found the Distributions out of the $4 Million Preferential Return Constituted Breaches of Fiduciary Duty.

Susan Lintz identifies three categories of purportedly improper transfers from Sterling out of the $4 million preferential return payment:

1. About $2.4 million was transferred to Amberhill by means of 165 fund transfers entered on the Amberhill ledger.

2. About $500,000 was paid to Dohr and Child as loans to Dohr and Dohr-controlled entities, repayment to Dohr and Child of existing loans, or payment of Dohr's legal fees.

3. $1 million was paid to Yellow Duck, which was 90 percent owned by the Dohr Grandchildren's Trust.

A. *$2.4 Million Transferred to Amberhill*

Susan Lintz argues the $2.4 million distributed to Amberhill was a disguised dividend to Dohr that had no corresponding benefit to her. The trial court found that Dohr and Child made a "defensible business decision" to distribute $2.4

million as a loan to Amberhill. The court found: "While Susan contends that this money was essentially an indirect payment to Dohr (the sole owner of Amberhill), it in fact was used in large part to repay Amberhill's substantial debts to Atavus. Over the years, Atavus, through loans to Amberhill, had been the source of funds to pay the various G&A expenses (e.g., rent, insurance, professional fees, allocated overhead) incurred by Amberhill in managing various limited liability corporations. Those payments on behalf of Amberhill were properly recorded as loans on the books of the limited liability corporations. Since distributions to Sterling (and therefore its shareholders) depended on Atavus remaining viable, this loan was a reasonable exercise of fiduciary responsibilities. The foregoing discussion also serves as justification for the $371,200 payment to Amberhill directly out of the Regent Ontario proceeds for that entity's project-related G&A expenses."

Those findings are supported by substantial evidence. The Sterling general ledger and the Amberhill general ledger record 165 individual fund transfers from Sterling to Amberhill during the period December 2010 to September 2015. The aggregate amount of the transfers was $2.4 million. The transfers were recorded on the ledgers as loans.

Amberhill not only served as Atavus's manger, it also was responsible for administering a series of single-purpose limited liability corporations in which Atavus and Sterling held direct or indirect ownership interests. Neither Sterling, nor Atavus, nor any of these entities had employees, offices, or overhead of its own. Each single-purpose entity incurred direct expenses, such as project supervision and property taxes, which were paid by each entity directly. Due to the collapse of the real estate economy starting in 2006, the special purpose entities were unable to pay those direct expenses or their proportionate share of Amberhill's overhead expenses. Using a Star Wars analogy, Dohr called Amberhill the "mother ship" that absorbed all the administrative costs, including

employee benefits, for these entities. Amberhill had to borrow from Atavus to do so. Sterling was supposed to reimburse Amberhill for the cost of its administrative services.

Dohr testified that after 2008, Amberhill no longer received reimbursement from the companies it administered because those companies "simply weren't generating liquidity fast enough." The loans from Atavus were used, Dohr testified, to "help fill the gap or fill the hole in terms of supporting the operation." He testified that when the Regent Ontario property was sold, Regent Ontario paid Amberhill $330,000 as a "G and A" fee (reimbursement for administrative costs). Regent Ontario should have been paying Amberhill that fee "over many years" but had not had the financial ability to do so. The payment from Regent Ontario still did not make Amberhill whole.

Dohr testified that Amberhill would not have been able to continue providing administrative services to the single-purpose entities or absorb their expenses if Amberhill were unable to recoup the expenses it had incurred on their behalf. He testified if Amberhill "simply disappeared," then "[a]ny projects would probably be liquidated. You couldn't find a manager to manage for nothing, so it would have . . . impacted the projects. The whole thing would have been liquidated no doubt and gone away." He testified that Amberhill lost millions of dollars on managing the various project entities.

The Amberhill general ledger and the Atavus general ledger show that about 60 percent of the loans Amberhill received from Sterling were used to repay Amberhill's loan obligations to Atavus.

While the trial court's factual findings are sound, the court erred by assessing their legal impact under the business judgment rule ("defensible business decision") instead of the *Jones* rule. But we conclude the error was harmless. On the surface, distribution of $2.4 million to Amberhill, a company owned entirely by Dohr, looks fishy. The trial court sensed as much. But the facts as found by the trial court do not show that by making the loans to Amberhill, Dohr and Child acted in bad faith, to the

benefit of Dohr (the majority shareholder of Sterling) alone, or to the detriment of Susan Lintz. Amberhill had for years been absorbing the administrative costs for those projects and was entitled to reimbursement. Preferential returns on Sterling's $7 million preferred capital account with Atavus depended on the profitability of the various development projects in which Atavus had an ownership interest. Keeping Amberhill afloat was necessary to keep the development projects alive. In addition, Amberhill used a majority of the funds it borrowed to repay Atavus, which would enable Atavus to make preferential returns to Sterling.

Thus, had the trial court used the *Jones* rule instead of the business judgment rule, it is reasonably probable the court would have concluded Amberhill, Dohr, and Child did not breach their fiduciary duties to Susan Lintz by distributing $2.4 million of the preferential return as loans to Amberhill.

B. *$500,000 Paid to Dohr and Child*

Susan Lintz argues about $500,000 from the $4 million preferential return was improperly distributed to Dohr and Child "primarily as loans by Sterling to Dohr and Dohr-controlled entities, as repayments to Dohr and Child of existing loans on the Sterling books, and as payments of legal fees."

Amberhill, Dohr, and Child assert Susan Lintz forfeited the issue of payment of Dohr's attorney fees because she did not raise it in the trial court. She does not respond to that assertion. Theories not raised in the trial court generally cannot be asserted for the first time on appeal unless they present a question of law applied to undisputed facts. (*Ryan v. Real Estate of the Pacific, Inc.* (2019) 32 Cal.App.5th 637, 644; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) Susan Lintz's argument about payment of Dohr's attorney fees does not present a pure issue of law. We deem the argument waived.

We also deem waived Susan Lintz's arguments concerning new loans to Dohr and Child and repayment of loans made by them. "'Appellate briefs must provide

argument and legal authority for the positions taken. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."' [Citation.] 'We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.'" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; see *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 ["[Appellant] has also failed to support many of its points with cogent argument, legal authority or specific citations to the record on appeal"]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them"].)

Susan Lintz presents no argument about the propriety of new loans to Dohr and Child or of the repayment of loans they made. Her Respondent's Brief/Cross-Appellant's Opening Brief has a subsection with the heading "New Borrowings By Dohr and Payment of Dohr's Legal Fees Breached the *Jones v. Ahmanson* Standard" (boldface omitted), but this subsection only addresses payment of Dohr's legal fees. Susan Lintz's Reply Brief has a subsection with the heading "Sterling's Loans to, and Repayment of Loans From, Dohr and Child Violated *Jones v. Ahmanson*." (Boldface omitted.) This subsection too is devoted almost entirely to the issue of payment of Dohr's attorney fees. The only mention of loans in this subsection is in the last paragraph, which appears to concede that Dohr and Child have repaid any loans from Sterling: "Moreover, to the extent that Dohr and Child argue briefly at page 52 of the C-R Brief that some of the Sterling loans made to them were repaid, this is only a small part of the overall picture. The big picture is that Dohr and Child took millions of dollars out of Sterling to the detriment of Susan Lintz." If the issue of loans to or from Dohr and Child is argued elsewhere in Susan Lintz's appellate briefs, we deem the argument waived. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114 [argument not made under separate argument heading is deemed waived].)

C. *$1 Million to Yellow Duck*

Susan Lintz argues that $1 million of the $4 million preferential return payment was improperly paid to Yellow Duck, an entity controlled by Dohr, which used the money solely for their benefit.

The trial court found: "$1 million loaned to Yellow Duck was used to settle a lawsuit brought by a lender (First Tier) that threatened to foreclose Colorado property in which Atavus (through its membership interest in Songbird Silver Peaks, LLC) had a 12.25% interest. (Exh. 463) Although that settlement personally benefitted both Dohr and Child as individual defendants and guarantors on the underlying real estate loan, it also benefitted Atavus and, therefore, Sterling, as it preserved the ability to recoup Atavus'[s] $500,000 investment if and when the real estate market recovered. While there is room for debate whether this $1 million loan to Yellow Duck ultimately was in the best interests of Sterling, the fact remains that Dohr and Child made a defensible business decision in light of the circumstances at the time. That is enough to satisfy their fiduciary duties."

In December 2010, Yellow Duck borrowed $1 million from Sterling. At that time, Yellow Duck was owned 90 percent by the Dohr Grandchildren's Trust—a "prospective trust" inasmuch as Dohr as yet had no grandchildren. Child was the trustee of the Dohr Grandchildren's Trust.

Atavus owned a 12.5 percent interest and had a $500,000 capital account in a real estate development limited liability company called Songbird Silver Peaks, which had borrowed money from First Tier Bank for a development project. Dohr and Child personally guaranteed the loan. In 2010 Songbird Silver Peaks was in default of the loan, and First Tier Bank, facing seizure by the FDIC, sued Dohr and Child to enforce the guarantees. The loan balance was between $6 million and $7 million. If the property were foreclosed on, Songbird Silver Peaks would have been "wiped out."

Dohr and Child reached a settlement with First Tier Bank whereby the loan balance would be reduced by $1 million through the purchase of two building lots that were part of the collateral for the loan. Sterling could not serve as a buyer because it was not a "remote entity" (legally unrelated to the borrower or guarantors). Yellow Duck was used to facilitate the purchase. Dohr and Child made the decision that Sterling would loan Yellow Duck $1 million to facilitate this settlement with First Tier Bank by purchase of the two building lots.

When asked what benefit Sterling obtained by loaning Yellow Duck $1 million, Dohr testified: "Ultimately Sterling will develop the land at some point in the future, either with Yellow Duck or with Sterling, but you have to remember it's very common [for] real estate companies . . . to be cross-collateralized either their personal guarantees or however the debt was structured. So we needed – I mean the loan needed to be brought current to maintain the integrity of the operation and also to maintain . . . Atavus'[s] interest in the project." Dohr and Child had personal guarantees on many cross-collateralized loans. A default on one guarantee would have caused defaults on all the guarantees resulting in a collapse of the entire investment structure.

In 2012 Yellow Duck conveyed the two building lots to Sterling in repayment of the loan. Dohr testified that Yellow Duck got nothing out of the transaction. None of the $1 million loaned to Yellow Duck was used directly for Dohr's personal benefit.

The trial court used the wrong legal standard by finding the decision to loan Yellow Duck $1 million was a "defensible business decision." The question we must answer is whether, had the trial court applied the *Jones* rule it is reasonably probable the court would have found that Amberhill, Dohr, and Child breached their fiduciary duties. This is a closer call than the issue of the $2.4 million in loans to Amberhill. Atavus had a capital investment of $500,000 in Songbird Silver Peaks, and Sterling had a 10 percent ownership interest in Atavus. Thus, collapse of Songbird Silver Peaks would have

resulted in a direct loss to Sterling of only $50,000. Loaning $1 million to Yellow Duck in the hope of saving $50,000 seems like a bad decision that had little or no benefit to Susan Lintz as a minority shareholder of Sterling. In contrast, the $1 million loan to Yellow Duck enabled Dohr and Child (controlling shareholder/directors of Sterling) to avoid liability on their personal guarantees to First Tier Bank on a loan with a balance of between $6 million and $7 million. Given those facts, it would seem at first glance that Sterling's $1 million loan to Yellow Duck disproportionately benefitted the controlling shareholder/directors to the detriment of a minority shareholder and therefore constituted a breach of fiduciary duty under *Jones.*

We believe nonetheless it was not reasonably probable that the trial court, had it followed *Jones*, would have reached a decision more favorable to Susan Lintz. We believe that to be the case because the trial court, expressly or impliedly, found Dohr's testimony to be credible, and we are bound by the trial court's credibility determinations. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) Dohr testified, in essence, that collapse of Songbird Silver Peaks would have a domino effect due to cross-collateralization with the result that all of the various development projects that fed into Atavus would fail. Thus, failure of Songbird Silver Peaks would impair or prevent Atavus's ability to make preferential returns to Sterling of its $7 million capital account. Dohr's testimony in this regard is completely lacking in specifics, but the trial court apparently believed him. Dohr also testified Yellow Duck repaid the loan by conveying the two development lots to Sterling. At the time of trial, one lot was in escrow and the other had a prospective buyer, and he anticipated a gain on the sales.

Given those facts, it is reasonably probable the trial court would have found that the $1 million loan to Yellow Duck did not disproportionately benefit Dohr and Child to the detriment of Susan Lintz, but benefitted all of the shareholders of Sterling proportionately by preserving the source of Sterling's preferential returns.

IV.

Susan Lintz's Causes of Action for Fraud Are Without Merit.

Susan Lintz alleged causes of action against Dohr and Child for fraudulent misrepresentation and fraudulent concealment. She argues the evidence at trial established that Dohr and Child made fraudulent misrepresentations and committed fraudulent concealment in two respects: (1) in 2003 Dohr and Child misrepresented the structuring of Sterling and Atavus and (2) in 2010 Dohr and Child concealed the sale of Regent Ontario. The trial court made no express findings regarding the fraudulent misrepresentation and concealment claims. Because Susan Lintz did not bring such omissions to the trial court's attention, we will infer the court made whatever implied findings are necessary to support the judgment. (*Fladeboe, supra*, 150 Cal.App.4th at pp. 59-60.)

A. *Fraudulent Misrepresentation*

Susan Lintz argues that in 2003, while Atavus was being formed, Dohr, Child, and Williams told her the preferred return account for Sterling would provide her and Jim Lintz percentage distributions on a current basis whenever Sterling received income. At trial, Susan Lintz testified that Dohr and Williams told her that she and Jim Lintz, as the adult children of Robert Lintz, would receive liquidity distributions from Sterling. She contended that promise was breached in 2010 when Sterling failed to pay out the $4 million preferential return payment as a dividend.

At trial, Dohr denied telling Susan Lintz in 2003 that Sterling would automatically pay out as dividends any money it received as preferential returns. Dohr testified that payment of dividends would not be automatic: "It would depend on the set of circumstances at that time; economic circumstances, business circumstances. There was not a mechanical relationship that mandated the money was going to be distributed

from Sterling. . . . [I]t would not be wise to make that kind of commitment years in advance not knowing the circumstances."

We presume the trial court accepted Dohr's testimony as credible, and we accept the court's credibility determination. Dohr's testimony, and the lack of any corporate document requiring Sterling to pay dividends, is substantial evidence supporting an implied finding that no misrepresentations were made in 2003 regarding Sterling's dividend distributions.

B. *Fraudulent Concealment*

Susan Lintz argues that in the fall of 2010 Dohr and Child concealed the sale of Regent Ontario. She argues: "On October 1, 2010, accountant Timothy Maher, in his role as accountant for Susan Lintz, transmitted a letter to Dohr and Child dated September 30, 2010 which raised multiple questions and issues with respect to Regent Ontario and other transactions. . . From that moment on, Dohr and Child cut off the flow of information where Regent Ontario was concerned. They concealed the sale transaction. [¶] . . . . The money was taken by Cross-Defendants on December 14, 2010 in secret, and Susan Lintz was excluded from the decision making with respect to distribution and use of the upstreamed money. This was concealment."

Susan Lintz identifies no evidence of concealment. Deceit includes "[t]he suppression of a fact, by one who is bound to disclose it." (Civ. Code, § 1710, subd. (3).) Although Dohr declined to offer information about the Regent Ontario sale to Susan Lintz's forensic accountant, there is no evidence Dohr suppressed facts about the sale.

Further, there no evidence that Dohr or Child had any obligation to disclose facts about the Regent Ontario sale to Susan Lintz. (*Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 831 ["To maintain a cause of action for fraud through nondisclosure or concealment of facts, there must be allegations demonstrating that the defendant was under a legal duty to disclose those facts"].) Susan

Lintz was never a member of Regent Ontario and it owed her no fiduciary duty of disclosure.

Susan Lintz has not identified any evidence that Dohr or Child made misrepresentations to her about the sale of Regent Ontario property. In August 2010, she and her accountant attended a meeting at Amberhill at which information was provided about imminent foreclosure of Regent Ontario property unless new financing could be obtained. She learned at the meeting that refinancing was necessary to prevent foreclosure. She does not contend she was told anything that was untrue, misleading, or incomplete regarding Regent Ontario. As it turns out, she did not invest in Regent Ontario.

DISPOSITION

The judgment in favor of Susan Lintz is reversed. In all other respects, the judgment is affirmed. Appellants and Respondents Amberhill, Dohr, and Child may recover their costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.